FILED
OCT 29 1992
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(2)

No. 92-720

In The

Supreme Court of the United States

October Term, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MT. DIABLO HOSPITAL MEDICAL CENTER,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, under the Medicare program, a health care provider may obtain reimbursement under 42 U.S.C. Section 1395x(v)(1)(A)(ii) ("Clause ii") in excess of the cost limits established by the Secretary of the Department of Health and Human Services ("Secretary") even if the provider does not qualify for an exception or exemption under the Secretary's regulations.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Respondent, Mt. Diablo Hospital Medical Center, and Memorial Hospitals Association. Only Mt. Diablo Hospital Medical Center continues to be a party before this Court. Mt. Diablo Hospital Medical Center is a governmental entity, *i.e.*, a district hospital, and thus has no subsidiaries, etc.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 963 F.2d 1175 and is appended to the Secretary's Petition for a Writ of Certiorari at pages 1a-19a. The opinion of the District Court (Pet. App. 24a-39a) and the decision of the Provider Reimbursement Review Board (Pet. App. 21a-23a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1992. A Petition for Rehearing was denied on

July 24, 1992. Pet. App., 20a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

The "Statement" contained in the Secretary's Petition for a Writ of Certiorari (at pp. 2-7) is basically accurate. However, additional material facts will have to be discussed upon the briefing of the merits of the case should the Court grant certiorari.

ARGUMENT

While the question presented for review in this case is whether a health care provider may obtain reimbursement under Clause ii in excess of the cost limits established by the Secretary even if the provider does not qualify for an exception or exemption under the Secretary's regulations, that issue will turn largely on the issue of whether the Ninth Circuit's decision in *Regents of the Univ. of California v. Heckler*, 771 F.2d 1182, 1188-92 (9th Cir. 1985), was overruled by this Court in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). The Ninth Circuit correctly determined in the instant case that *Georgetown* did not overrule *Regents* but rather *Georgetown* cited *Regents* with approval. (Pet. App. 15a-17a.)

This Court has granted certiorari in *Good Samaritan Hosp. v. Sullivan*, 952 F.2d 1017 (8th Cir. 1991), Supreme Court Docket No. 91-2079, to address the issue presented here. Thus, the Secretary asks this Court to "hold" his

petition for a writ of certiorari in this case pending the Court's decision in the *Good Samaritan* case. Respondent Mt. Diablo respectfully submits that the petition should not be held pending resolution of the *Good Samaritan* case, but rather, certiorari should also be granted here to assure that the issue in question is addressed in a sufficient context to avoid continuing confusion over the meaning of this Court's decision in *Georgetown* and *Georgetown's* impact on cases such as the *Regents* case and the instant case.

Respondent Mt. Diablo believes that this case should be briefed and heard together with *Good Samaritan* to assure that the central issue is resolved fully. According to the Eighth Circuit's decision in *Good Samaritan*, the hospitals in that case were "asking for retroactive rule changes, not merely the year-end book balancing allowed in *Georgetown*." The Eighth Circuit characterized the hospitals as "asking this Court to order the Secretary to retroactively adjust cost limits for the number of part-time workers." 952 F.2d at 1024 (*Good Samaritan* Pet. App. at 13a.) If the Eighth Circuit's characterization is correct, then the relief sought by the hospitals in *Good Samaritan* is distinguishable from the relief sought and granted by the Ninth Circuit in Mt. Diablo's case. In addition to seeking to invalidate the cost limits due to the Secretary's failure to consider relevant factors, Mt. Diablo also sought an individualized adjustment to the aggregate amount of its reimbursement under Clause ii, "not [retroactive] revisions in the cost methods used by the Secretary." (Pet. App. at 17a). Significantly, the relief sought and awarded in the *Mt. Diablo* case is the same as that sought and awarded in *Regents*.

Because the relief sought by a provider is critical to the resolution of the issue presented, it is imperative that the Court be presented with a case or cases involving the same relief requested in the *Regents* case since the continued vitality of the *Regents* case has been questioned by the Secretary and affirmed by the Ninth Circuit.

To facilitate the resolution of this case together with the *Good Samaritan* case, Respondent Mt. Diablo is prepared to adhere to the same briefing and oral argument schedule established in the *Good Samaritan* case.

CONCLUSION

Respondent Mt. Diablo agrees that a petition for a writ of certiorari should be granted in this case, however, Mt. Diablo disagrees that this case should be held pending the Court's decision in *Good Samaritan*. Rather, Mt. Diablo respectfully submits that the case should be heard together with the *Good Samaritan* case in order to resolve fully the issue presented.

Respectfully submitted,

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